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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-991

OTTER TAIL POWER COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR APPELLANT OTTER TAIL POWER COMPANY

Having set forth its position at length in its main brief, Otter Tail shall confine itself here to clarifying certain issues obscured in the Government's presentation and to correcting significant misstatements as to the facts and the governing law.

I.

Section 202(b) Of The Federal Power Act Precludes The Application Of Antitrust To Compel A Regulated Utility To Sell Electricity At Wholesale.

A. The Legal Principles Of Exclusive Jurisdiction Are Not Disputed.

1. The Government devotes a considerable portion of its brief (substantially all of Point I, pp. 40-64) attempting to demolish the straw man argument that regulated industries are totally immune from antitrust. But the broad issue of the applicability of antitrust in general to electric utilities is not before this Court.[1] As Otter Tail stated in its main brief (p. 41), "[t]he question at bar is not whether there is any express exemption or implied immunity from antitrust but rather whether Congress intended the provisions of § 202(b) to be nullified by an antitrust suit predicated upon the same subject matter."

2. On this narrow point there appears to be no disagreement as to the controlling legal principles. In its brief, the Government recognizes that the application of antitrust to a given subject matter "depends upon how the particular regulatory statute invoked, and the antitrust remedies asserted, apply to the specific conduct in issue." Gov't Br., p. 42.[2] The test, stated in the Government's *Ricci* brief (p. 14), is whether

> "... the agency has 'pervasive' regulatory authority over the industry involved, including *the power* either

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[1] *Compare* Pennsylvania Water & Power Co. v. Consol. Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950), *with* Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

[2] The Government proceeds to compare a series of cases illustrating that antitrust may apply to certain kinds of conduct in a regulated industry while others remain subject to exclusive agency jurisdiction. *Id.* at 42-43. *Cf.* Otter Tail Br., p. 43.

> to *grant effective relief against conduct which violates basic antitrust policies* or to immunize such conduct from the operation of the antitrust laws." (Emphasis added.)

In that case the Government stresses the apparent unavailability of "a procedure . . . under the Commodity Exchange Act whereby [the agencies] could consider any of the contentions raised by petitioner in his antitrust suit." *Id.* at 8. *See also id.* at 12-13. Another factor relied on in the Government's *Ricci* brief is "whether resolution of a particular issue by the courts will unduly interfere with [the regulatory scheme]." *Id.* at 13.[3] Put another way, antitrust will not apply if there is a "plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351 (1963).

3. The Government's legal contentions are thus compatible with those urged by Otter Tail in its main brief (pp. 26-32, 41-45) and by the Federal Power Commission in its brief amicus curiae (pp. 12-19, 22-24). The specific points of disagreement all relate to the application of recognized principles to the case at bar, *i.e.*, (i) whether § 202(b) does provide an adequate remedy to compel wholesale sales, (ii) whether the subject matter of wholesale sales is pervasively regulated, and (iii) whether the decision and judgment below are repugnant to the applicable regulatory scheme.

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[3] In United States v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87 (1913), the Court upheld a *criminal* antitrust indictment, indicating that such judicial action could not interfere with the ICC's "power to pass on the rates, as such, or through routing, as such." *Id.* at 105. Unlike the instant case, the lower court there entered no injunction to disrupt the regulatory scheme. *Cf.* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966). Furthermore, *Pacific & Arctic* involved a conspiracy which could be criminally attacked separate and apart from the subject matter directly within the scope of agency jurisdiction. *Cf.* Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).

B. Section 202(b) Does Provide An Adequate Procedure For Compelling Wholesale Sales.

The Government argues that § 202(b) does not provide an adequate remedy because (1) it fails to deal with litigation, (2) it may not apply to proposed municipal systems, (3) it is too burdensome to be of practical use to municipalities, and (4) it does not permit the issuance of a blanket order requiring a utility to sell at wholesale in all cases, regardless of the circumstances.

1. The Government's first argument (Gov't Br., pp. 39, 93) is again a straw man. Otter Tail has never suggested that its litigation efforts are subject to the exclusive jurisdiction of the FPC; its argument in this regard—clearly stated at pages 64-68 of Otter Tail's main brief—is that its conduct was not violative of the Sherman Act and is in any event protected under *Noerr* and *California Motor Transport*. The fact that the Federal Power Commission regulates certain kinds of utility activity (interstate transmission and wholesale sales) but not others (*e.g.*, litigation) merely illustrates the principle apparently recognized by all parties that the scope of an agency's exclusive jurisdiction depends upon the nature of the "specific conduct in issue," not merely the industry involved, *See* page 2, *supra*.

2. Apparently recognizing the weakness of its argument that § 202(b) does not apply to proposed municipal systems, the Government carefully limits itself to suggesting that the point is "not clear." Gov't Br., pp. 39, 91. In fact, no such uncertainty exists. In providing that § 202(b) may be invoked by "any person engaged in the transmission or sale of electric energy," Congress plainly did not intend to limit the availability of this remedy. A person not engaged in the transmission of electricity would have no occasion to request a mandatory interconnection since he would have no system to interconnect with. Since § 201(d) of the Federal Power Act defines a wholesale sale to mean "a sale of electric energy . . . for resale," it would be meaningless to allow a person not

engaged in the sale of electricity to compel wholesaling. The Government would read the language of § 202(b), which was clearly meant to include every potential applicant, so as to exclude a municipality about to enter the power business merely because it had not sold or transmitted electricity at the time of its § 202(b) *application*. This artificial and forced construction of the statute totally ignores its underlying purposes and would create an illogical patchwork of antitrust and Federal Power Act application, depending solely upon the irrelevant happenstance of whether a municipality was about to, or had just, transmitted or sold its first kilowatt. It is inconceivable that this Court, which has consistently given the Federal Power Act a liberal, pragmatic reading,[4] would reverse course now by attributing such an erratic purpose to Congress. In any event, the Government's argument has no bearing on the instant case: Elbow Lake did obtain first a temporary and then a permanent interconnection under § 202(b); and undoubtedly Hankinson would not have been precluded from obtaining similar relief if it had sought it.[5]

3. The Government's argument that § 202(b) proceedings are too burdensome to provide an adequate remedy (Gov't Br., pp. 39, 92) assumes (i) that a private, antitrust suit would be less burdensome,[6] and (ii) that, as a prac-

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[4] *See, e.g.*, United States v. Public Util. Comm'n of California, 345 U.S. 295 (1953); FPC v. Florida Power & Light Co., 404 U.S. 453 (1972).

[5] Hankinson applied to the FPC in a complaint almost identical to that of Elbow Lake (GX-132, A. 285-286) for an order for compulsory wholesaling and wheeling. While this application was pending, the complexion of the Hankinson city council changed and the town accordingly elected to terminate its FPC proceeding and grant Otter Tail a new franchise. Elbow Lake and Hankinson are the only towns which Otter Tail allegedly "monopolized" by refusing to wholesale or wheel.

[6] Unless, of course, the Government intends always to prosecute such actions on behalf of municipalities at taxpayer expense; which, among other things, would mean a massive transfer of responsibility in this area from the FPC to the Justice Department.

tical matter, municipalities lack the resources to assert their Federal Power Act rights. The first assumption has no factual basis and indeed runs counter to common litigation experience. The second assumption is specifically negated by the facts of record: Elbow Lake has had sufficient resources to obtain two § 202(b) orders, bring both a state damage action and a federal antitrust suit, and file a brief amicus curiae in this appeal. Before its electorate voted the public power faction out of office, Hankinson brought proceedings before state and federal administrative agencies as well as commencing its own treble damage action. In sum, there is not one shred of evidence that any municipality was ever deterred (much less precluded) from bringing a § 202(b) proceeding because of financial hardship. However, even if the Government could prove its assertions, the proper means of remedying such a situation would be to urge the FPC (or, if necessary, Congress) to reform Federal Power Act procedures—not to seek judicial transfer of the FPC's functions to the district courts.

4. The Government's argument that § 202(b) is inadequate because it does not permit the issuance of a blanket order requiring a utility to wholesale in all cases (Gov't Br., pp. 92-93) in effect denies Congress' power to decide that determinations as to mandatory wholesaling be made on a case-by-case basis only. Congress plainly does have ample authority to insist—as it did—that the facts relevant to each § 202(b) application be considered separately by an appropriate, expert agency. The fact that the Judgment below is drastically broader than the kind of order Congress intended demonstrates, not that § 202(b) is inadequate, but that the Judgment is repugnant to the congressionally ordained scheme.

C. The Federal Power Act Does Provide A Pervasive Scheme Of Regulation With Respect To The Interstate Transmission And Wholesale Sale Of Electric Energy.

1. As demonstrated in Otter Tail's main brief (pp. 44-45), the Federal Power Act provides precisely the kind of "public utility regulation" which this Court found to be lacking in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). Just last term, in *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972), the Court reiterated that the federal enactment was intended to fill the "*Attleboro* gap," thereby creating a seamless web of pervasive state and national regulation. While the dissenters in that case favored state control over the utility in question, they too recognized Congress' intent that, "once fastened onto a company," "federal regulation [under Part II of the Power Act] was to be *pervasive* . . . ." 404 U.S. at 474. (Emphasis added). *See also Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 213-215 (1964); *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 307-308 (1953); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 524, 525-526 (1945). Indeed, as pointed out in Otter Tail's main brief (pp. 30-31), this Court has in fact already upheld the exclusive jurisdiction of the FPC in an analogous Federal Power Act context. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). *See also Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 423-424 (1952).

2. In the face of the specific regulatory provisions of the Federal Power Act, the Government argues that that enactment does not constitute a "pervasive regulatory scheme" by quoting out of context a single phrase from this Court's opinion in *California* v. *Federal Power Commission*, 369 U.S. 482 (1962), with respect to the Natural

Gas Act. (Gov't Br., p. 52).[7] But in that case the Court merely found that the Natural Gas Act is not "pervasive" insofar as it fails to give the FPC jurisdiction over stock acquisitions. In other areas the Natural Gas Act does give the FPC pervasive regulatory powers. With respect to gas "transportation," for example, this Court recently reaffirmed that the statute provides "a comprehensive and effective regulatory scheme" to "afford consumers a complete, permanent and effective bond of protection. . . ." *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 640 (1972). *See also id.* at 631. Thus, again, the pervasiveness and exclusivity of an agency's jurisdiction depends upon the subject matter—not the industry—involved in a particular case.

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[7] The Government's related assertion that "nowhere" in the legislative history of Part II of the Federal Power Act is there "any indication" of a congressional intent to establish a regulatory scheme in lieu of competition (Gov't Br., pp. 50-51), is simply not true. *See* Otter Tail Br. Add., pp. 17-20. Moreover, contrary to the Government's suggestion (Gov't Br., p. 48, n. 37), nothing in the legislative history of the Public Utility Holding Company Act negatives this congressional purpose in enacting the Federal Power Act. The origins of the two pieces of proposed legislation were separate. *See Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 57-58 (1935). While both were designed to strengthen the effectiveness of state regulation, each was aimed at a different weakness. Thus, the Holding Company bill was aimed at the "giantism" of multi-utility aggregations that dwarfed state regulatory bodies. The Federal Power Act, on the other hand, was meant to close the *"Attleboro* gap," *i.e.*, to remedy the inability of state agencies to reach interstate sales by introducing a comprehensive scheme of federal regulation. *See* United States v. Public Util. Comm'n of California, 345 U.S. 295, 302 n. 7 (1953). Neither bill suggests that the inadequacy of state regulation was to be cured by application of antitrust rather than by the extension of agency jurisdiction for which Congress provided.

D. The Decision And Judgment Below Are Plainly Repugnant To The Regulatory Scheme Embodied In The Federal Power Act.

1. As demonstrated in Otter Tail's main brief (pp. 32-38), the district court's ruling is repugnant to the Federal Power Act because it would require wholesaling without regard for any of the criteria or procedures specified in the congressionally ordained scheme. In lieu of the balanced public interest standard specified by Congress, the court has substituted a tunnel-visioned approach based solely on competition, which is only one element of the "public interest." Instead of the procedure for case-by-case analysis provided by the Federal Power Act, the Judgment predetermines Otter Tail's obligation to sell at wholesale in all future cases, whatever the circumstances. Even though Congress has specified that no utility may be required to sell or exchange energy if such action would impose an undue burden, require the enlargement of generating facilities, impair service to existing customers or otherwise not be in the public interest, Otter Tail has been subjected to a blanket order to sell at wholesale regardless of such consequences. In place of Congress' scheme, which relies upon the discretion of an expert agency in enforcing the Federal Power Act, the decision below would establish a new regime of judicial determinations predicated exclusively upon the antitrust laws. Otter Tail knows of no case—and none has been cited by the Government—where the repugnancy between antitrust and a particular regulatory enactment is stronger or more dramatic than it is here.

2. This irreconcilable conflict is epitomized by the court's rejection of Otter Tail's erosion defense as a matter of law (A.46)[8] and the Government's supporting

[8] The court also rejected this defense on the ground that Otter Tail could not possibly be ousted from any additional municipalities because no alternative sources of power would be available to replace it (A.46). In other words, Otter Tail has been ordered to wheel power from governmental suppliers on the assumption that no such

statement that "the right of a business to survive has never justified attempts to suppress the right of others to compete." Gov't Br., p. 84. It is difficult to conceive of an assertion more at odds with the purposes and requirements of the Federal Power Act. What is left of Congress' proviso that no utility be required "to sell or exchange energy when to do so would impair its ability to render adequate service to its customers" (§ 202(b)) if the utility itself may be totally destroyed by the effects of an ill-conceived antitrust decree? How can the aim of "assuring an abundant supply of electric energy throughout the United States" (§ 202(a)) possibly be reconciled with the callous, wooden view that the survival of a utility serving a hundred thousand consumers is a matter of absolutely no import? If the Government's position is correct as a matter of antitrust law, then isn't that, by itself, proof positive that the Sherman Act is repugnant to the Federal Power Act in this area?

3. In answer to Otter Tail's argument, the Government states (Gov't Br., p. 91) that if Otter Tail had declined to offer wholesale service because of "a threat to its ability to serve other communities," then its refusal "presumably would not have violated the antitrust laws." But Otter Tail *did* defend its action on this basis by offering proof that compulsory wholesaling or wheeling would erode, and eventually destroy, its integrated system.[9] The Government, however, persuaded the court to disregard this evidence. Consequently, as the FPC states in its brief amicus curiae (p. 20):

> "No adequate consideration was given to the continued viability of Otter Tail or its ability to render adequate service to other customers."

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producers will have any electricity for sale. If the court is correct, the Judgment is moot. Conversely, the Judgment will be effective *precisely to the extent that its factual predicate is wrong.*

[9] DX-41, A. 1194-1195, 738; DX-96, A. 952; A. 703-721, 737-749.

The Government cannot mitigate the repugnancy between antitrust and the Federal Power Act by its present, inconsistent claim that a district court may consider the very circumstances that the Government maintained—and still maintains—are irrelevant to its determination.

4. The Government further argues that the district court's continuing jurisdiction may be relied upon as a safeguard for Federal Power Act objectives. *See* Gov't Br., pp. 100-101. Having already held that Otter Tail's survival is irrelevant, it is hardly reassuring that the court may consider applications for "appropriate relief" if "... compliance with the decree threatens to impair [Otter Tail's] ability to meet its obligations as a public utility. . . ." *Id.* at 101. Furthermore, the requirement that Otter Tail must wholesale in all cases except where it can persuade the court to grant an exception, in effect stands the Federal Power Act on its head. That statute provides precisely the opposite scheme, whereby utilities are free to refuse wholesaling except where specifically ordered to sell or exchange power by the FPC. Thus, whereas Congress intended that no utility be compelled to wholesale unless the FPC first exercises its discretion in accordance with the Federal Power Act, under the decree Otter Tail must always wholesale unless it can discharge the heavy burden of persuading the court to modify its Judgment for reasons already held to be immaterial.

5. The Government gives no indication as to how the remaining criteria set forth in § 202(b) are to be observed. Is the district court to determine, in each instance, that providing wholesale service will impose "no undue burden" on Otter Tail, require no enlargement of generating facilities, and otherwise be in the "public interest"? If so, the Court will be usurping the precise duties of the FPC, thereby assuming a task for which it is totally unqualified. If not, the congressionally provided criteria will be simply ignored. It is no answer to assert—as the Government

does (Gov't Br., p. 101)—that Otter Tail has violated the law and must now take the consequences. Section 202(b) was intended by Congress to protect not only utilities, but also—and more importantly—the public. There is no possible reason in law or policy why consumers of electricity and the FPC must now "~~except~~ expect some fencing in." *Id.*

6. The Government further argues that court-ordered wholesaling is "voluntary" and therefore not subject to FPC approval. Gov't Br., pp. 98-99. Surely, to characterize a wholesale sale made under the compulsion of a court decree as "voluntary" is a manifest contradiction in terms. What is more, it also subverts the whole scheme of regulation that the Federal Power Act provides. The purpose of § 202 as a whole is to encourage interconnections while guarding against dangers to utility systems that would harm the public interest. In the case of compulsory interconnections under § 202(b), the latter objective is realized by the application of specific statutory criteria. In the case of voluntary wholesaling under § 202(a), the utilities' own self-interest provides a safeguard against any form of economic suicide that would injure the public. The district court's decree, on the other hand, requires Otter Tail to wholesale even though such action is contrary to both § 202(b) and Otter Tail's own business judgment. Thus, by inverting the plain meaning of the word "voluntary," the Government would remove all protection for the public interest and Federal Power Act goals which mandate that the viability of utility systems be preserved.

7. Finally, the Government attempts to distinguish anticompetitive from "bona fide" refusals to interconnect, and suggests that this is the proper line of demarcation between antitrust and FPC jurisdiction. Gov't Br., pp. 90-91. Apart from the fact that this was not the basis on which the case was tried and decided, in propounding this position—advanced for the first time on this appeal—the Government totally ignores the teaching of *McLean Trucking Co.* v.

United States, 321 U.S. 67 (1944), *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), and *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), that competition is but one part of the public interest standard that can only be applied by the agency responsible for a particular, regulated field. *See* Otter Tail Br., pp. 38-41; FPC Am. Br., pp. 19-21. Thus, for example, the Federal Power Commission may consider Otter Tail's refusal to sell at wholesale in a given case in light of all applicable criteria, including both the effect on competition and the possible impairment of Otter Tail's ability to render adequate service. The FPC may then apply its expertise to prepare an order that will best serve to promote Federal Power Act goals. In an antitrust suit, however, Otter Tail's action may be simplistically branded as "anticompetitive," at which point all other considerations are dismissed as immaterial. As the FPC states in its brief amicus curiae (p. 20):

> "Such a sterile application of antitrust law clearly does not satisfy this Court's decision that the encouragement of competition is not the single or controlling reliance for safeguarding the public interest. *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 93."

8. If the Government prevails, it is plain that virtually every dispute as to compulsory wholesaling will be converted into an antitrust case. It is difficult to imagine that any utility operating in a natural monopoly market that refuses to aid in its own ouster from a particular community by offering to supply wholesale power to a proposed municipal electric system will not be charged with an improper "anticompetitive" purpose. Thus, any municipality which henceforth wishes to compel an interconnection will presumably begin by commencing an antitrust suit. The district court will then determine the bona fides of the defendant's refusal, disregarding any claim that erosion of the defendant's system will itself impair service. To resist

compulsory wholesaling, the defendant must prove that his refusal is based solely upon one or more of the provisos in § 202(b). In other words, he can succeed only in a case in which the FPC would be statutorily barred from entering a compulsory wholesaling order. In all other circumstances (or, if the court finds an "anticompetitive" motivation, even if the FPC would be barred) the defendant will be subjected to the full panoply of antitrust sanctions, including an order that may direct him to sell at wholesale, not only to the plaintiff, but to any other person who may thereafter make a demand. Such a regime would produce a weird system of regulation, with the courts, rather than the duly authorized expert agency, bearing the responsibility for adjudicating the "bona fides" of a utility's Federal Power Act contentions. As a method for determining whether a utility must sell at wholesale, it would differ from the scheme that Congress provided in (i) the nature of the proceeding, (ii) the standards to be applied, (iii) the consequences for a defendant if he loses, and (iv) the identity of the decision-making authority. In short, it would be repugnant to the regulatory enactment in all material respects.

II.

Congress Has Specifically Determined That No Utility Should Be Required To Wheel Electric Energy Against Its Will.

1. In its main brief (pp. 46-53 and Addendum) Otter Tail reviewed at length the legislative history of Part II of the Federal Power Act which shows that the 74th Congress made a deliberate decision not to impose forced wheeling on the electric utility industry. The Government's brief makes no effort whatsoever to challenge or impeach this clearcut evidence of congressional intent.

2. The Government suggests (Gov't Br., pp. 90-91, 97) that compulsory wheeling under the antitrust laws is nevertheless compatible with Congress' determination since such a duty would only arise where a utility refuses to wheel in order to "suppress competition" (*i.e.*, prevent its own ouster from a particular municipality). But this is precisely the situation in which Congress decided that utilities should not be compelled to wheel. The principal objection raised by opponents to the original bill was that a duty to wheel would lead to the erosion of private systems because of the inherent impossibility of competing with tax-free, subsidized government power. Otter Tail Br., p. 47 and Add., pp. 3-4, 6-9. Throughout the hearings, the bill's draftsmen continually reassured Congress that utilities would not be required to promote their own ouster from existing markets by being compelled to wheel government power to municipalities. *See* Otter Tail Br., pp. 48-50 and Add., pp. 12-16, 22-24. Unconvinced, Congress excised all wheeling provisions from the Act in order to ensure that involuntary wheeling would not be forced on any utility. Otter Tail Br., p. 50 and Add., pp. 27-28. In so doing, Congress of course proceeded on the assumption that it was acting effectively—that is, that the issue was not already moot in 1935 because a duty to wheel already existed under the Sherman Act of 1890. *See* Otter Tail Br., p. 52 and Add., p. 21.

3. If the Government prevails, wheeling could be compelled in the very circumstances that the utilities most feared and that Congress carefully acted to avoid. Any municipality which requires the use of a private utility's lines to transmit government power would henceforth be able to compel wheeling automatically. All the municipality would have to do would be to bring an antitrust suit, alleging (i) that the utility's lines provide the most economical means of transmitting government power (a circumstance that will always be true in any situation where it would make sense for a municipality to request wheeling

in the first place), and (ii) that the utility has an "anticompetitive" objective (since no rational utility will welcome its own ouster from a given municipality). Having thus made out a case of "monopolization," the municipality may then simply take over the utility's retail business in the town, compelling the use of its facilities to bring in subsidized government power.

4. The net effect of forced wheeling is thus not competition, but partial socialization (*i.e.*, public ownership of large segments of the retail electric industry). This is how the problem was presented to Congress in 1935 (*Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 1197-1198 (1935); *Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 271 (1935); *see also* Otter Tail Br., p. 47 and Add., pp. 2-10); and while Congress could have opted for such a regime, it instead chose to protect free enterprise by deciding against any form of compulsory transmission. Surely, any reversal of this determination—which was a political decision involving a major matter of national policy—should be effectuated by the representative, rather than the judicial branch of government.

5. The Government totally fails to meet the point that Congress has repeatedly been asked to reverse its 1935 determination, but has consistently refused to do so. Otter Tail Br., pp. 53-57 and Add., pp. 28-51. Indeed, the Government's sole response is its *ipse dixit* that this further compelling evidence of congressional intent—together with the fact that the very issue presented to this Court has been, and is now before Congress—"should not be construed to foreclose Sherman Act remedies [*i.e.*, forced wheeling] by implication". Gov't Br., p. 95, n. 77.

6. The Government's assertion that the other legislation cited in its footnote 77 is "more in point" is utterly unsupportable. In each of those bills the proposed anti-

trust exemption was particularly meant to cover true market allocations, such as that condemned in *Montana-Dakota Utilities Co.* v. *Williams Electric Cooperative*, 263 F.2d 431 (8th Cir. 1959), and price-fixing. *See Hearings on S.3136 Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 10, 22, 28-30, 58, 61, 82, 87 (1966); *Hearing on S.683 Before the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 8, 21, 30, 34, 51 (1967). Congress' rejection of these bills thus relates solely to the straw man issue of whether antitrust may have any application to electric utilities at all.[10] It has nothing to do with Congress' specific and repeated determination that a compulsory duty to wheel should not be imposed.

7. In its *Ricci* brief (p. 17, n. 6) the Government recognizes that "[a]n exemption from the antitrust laws may be implied from a statutory scheme even though the agency involved has no jurisdiction to consider the challenged conduct." The Government goes on to state that the applicability of antitrust in any given instance depends upon Congress' intent. *Id.* In the instant case, Congress' intent not to impose forced wheeling is clearly and specifically evidenced by the legislative history. It may also be inferred, however, from the statutory scheme itself. If a municipality is free to seek a wheeling order from a district court, it may bypass the Federal Power Commission and § 202(b) altogether. The court may then direct that action be taken which is irreconcilably at odds with the provisions and policies of the Federal Power Act. In

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[10] This same is true with respect to the savings clause for antitrust in the Atomic Energy Act of 1954. *See* Gov't Br., pp. 46-47. That statute does highlight, however, Congress' decision not to include a similar provision in Part II of the Federal Power Act despite Solicitor DeVane's testimony that "if Congress should desire to establish competition in this industry it should be written in any legislation adopted by Congress." Otter Tail Br. Add., p. 17. *Cf.* Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230, 237-238 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

terms of the end result, it hardly matters whether it is compulsory wholesaling or wheeling that a court orders on the mistaken assumption that the utility's survival is irrelevant to its determination. In either event, the purposes and procedures which Congress intended to govern in this area will be totally frustrated.

8. The Government's reliance on *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952), is misplaced. That case involved a hydroelectric project that was to be constructed on government property and to include two transmission lines which "for most of their length crossed lands of the United States. . . ." *Id.* at 19. As a condition to granting a license, the FPC required that the utility undertake a limited obligation to wheel certain amounts of government power over the two lines directly in question. Had the land on which the lines were to be built belonged to another utility, that private company would certainly have been entitled to negotiate for the right to use the lines as its quid pro quo. By the same token, this Court held that Congress' constitutional authority over public lands is "without limitations." *Id.* at 21. The proposed condition was thus well within the powers delegated by Congress to the FPC "for the purpose of protecting the public domain." *Id.* at 24.

9. The wheeling condition sustained in *Idaho Power* is totally unlike the compulsory wheeling ordered in the instant case. First of all, *Idaho Power* did not involve the kind of forced wheeling that Congress had disapproved in 1935. On the contrary, the utility's agreement to wheel in consideration for the use of government land was akin to the very kind of private, contractual action that Congress determined should prevail in this area. *See* Otter Tail Br., p. 51, n. 36. Second, unlike the instant case, in *Idaho Power* there was no repugnancy between the condition sustained and the regulatory scheme provided by Part II of the Federal Power Act; that is, the agency's

action did not threaten the integrity of the criteria and procedures set forth in § 202(b). Finally, the condition in *Idaho Power* related solely to the two lines actually constructed on government property, and required the utility to wheel only "in such amounts as will not unreasonably interfere" with its own transmission. In contrast, the instant decree affects Otter Tail's entire system, and does not even safeguard the utility's survival, much less the unhindered use of its facilities.

10. Finally, the Government makes the argument that the Judgment below "advances" the Federal Power Act aim of encouraging voluntary coordination by requiring Otter Tail to wheel "voluntarily" in every case. Gov't Br., p. 99. In other words, the Government would equate "voluntary interconnections" with a court decree that orders a utility to wheel under penalty of contempt. This Orwellian syllogism, that would make "voluntary" a synonym for "compulsory", highlights a basic issue of this appeal—which is whether the word "voluntary" shall be deprived of all meaning as an expedient to revolutionize the power industry, or whether the integrity of language and of Congress' clearly expressed intent, shall be preserved. *See* Otter Tail Br., pp. 50-51 and Add., pp. 27-28.

11. The Government's position rests inevitably upon the proposition that the record of Congress' deliberations over a period of 37 years does not mean what it says, and that Congress has engaged in an unwitting charade in repeatedly declining to impose a duty that—according to the Government's present contentions (Gov't Br., pp. 52-54) and contrary to the assurances of the proponents of the Federal Power Act (Otter Tail Br., p. 52 and Add. 21)—has long been a matter of established law. Having failed to gain acceptance by Congress of its views (*see, e.g.*, Otter Tail Br., p. 55 and Add., pp. 39-40), it ill behooves the Justice Department to claim now that the entire legislative process was meaningless and unnecessary.

III.

The District Court Erred In Holding That Otter Tail Had Violated Section 2 Of The Sherman Act On The Basis Of Its Political And Litigation Activities.

A. The Government's Contentions Are Incorrect On The Facts.

1. The parties are apparently in agreement that political activity cannot be the predicate for an antitrust violation "either standing alone or as part of a broader scheme itself violative of the Sherman Act." *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 670 (1965). The Government seeks to avoid the conclusion that the district court erred in this regard, by stating:

> "The evidence fully described Otter Tail's efforts, both lawful and unlawful, to maintain its position. . . . But the complaint did not charge, and the district court did not find, any violation of the antitrust laws based upon Otter Tail's political activity." Gov't Br., p. 17, n. 13.

In its briefs below, the Government contended that, although political action might not constitute an antitrust violation in itself,

> ". . . evidence concerning Otter Tail's activities in this area is properly admissible and should be admitted as further proof of the company's intent and purpose to stifle the establishment of municipal power systems, thereby preserving and maintaining its monopoly position. Evidence of Otter Tail's extensive and unrelenting anti-municipal publicity underscores the fact that Otter Tail utilized every available means to preserve its monopoly position and makes manifest the company's purpose and intent to achieve that end." Gov't Pre-Trial Brief, p. 109.[11]

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[11] In a footnote, the Government continued:

"The 'Noerr Doctrine' was defined in narrow terms in *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970); and *Hays* v. *United Fireworks Mfg. Co.*, 420 F.2d 836, 839-841 (9th Cir. 1969)."

Whatever distinction the Government may have been seeking to draw, it is not reflected in the district court's opinion. The court summarizes as follows the Government's contentions that Otter Tail "acted illegally and improperly" in seeking to preserve its "monopoly position":

> "Specifically, it is urged that Otter Tail's refusal to sell or wheel power to towns desiring to establish municipal systems, *and its actions participating in local municipal power political campaigns*, and sponsoring, encouraging, and financially supporting court litigation are *all* intended to impede and frustrate attempts to establish independent municipal electric systems." (A.31-32; emphasis added).

The Court nowhere indicates that Otter Tail's political activities were lawful efforts to be disregarded or considered merely by way of background. Rather, when the court admitted such evidence over Otter Tail's objection,[12] it apparently considered it as part and parcel of the overall scheme of monopolization that, in the court's view, the Government had alleged.

2. With respect to litigation, the Government contends that "[a]ll of [Otter Tail's] suits were unsuccessful on the merits (with the partial exception of the trial court's ruling in the Aurora suit that the town could not buy its own bonds). . . ." Gov't Br., p. 27. The Government thus brands as "unsuccessful" a suit to compel the town of Aurora to hold an election which achieved precisely that result. It likewise views as "partially unsuccessful" a second suit which in fact fully achieved its objective of preventing Aurora from purchasing its own bonds without obtaining electoral approval. *See* Otter Tail Br., pp. 14-15. Rather than engage in a semantic quibble as to the meaning of "success" in a lawsuit, it is more germane to ask whether the instant record indicates a "pattern of

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[12] *See* Otter Tail Br., p. 13, n. 17.

baseless, repetitive claims" leading to the conclusion that "judicial processes have been abused." *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 513 (1972). Certainly a suit which prompts a defendant to voluntary compliance [13], which is upheld on the merits [14], or which is successful at the trial court level (even though reversed on appeal) [15] cannot be condemned as "baseless." The same is likewise true of unsuccessful suits which are lost purely on technical (and highly debatable) grounds. *See* Otter Tail Br., pp. 15, 18.

3. The Government accuses Otter Tail of misleading this Court in discussing Elbow Lake's unsuccessful damage action against Otter Tail because, according to the Government, that "suit merely involved the interpretation of an undertaking furnished by Otter Tail in connection with its unsuccessful suit." Gov't Br., p. 79, n. 65. In fact, Elbow Lake's suit was for damages, the bond in question being the source of Otter Tail's obligation to compensate the town for "any loss or damage" occasioned by Otter Tail's earlier action, including whatever harm the town may have suffered due to the delay in establishing its electric system. *Village of Elbow Lake* v. *Otter Tail Power Co.,* 281 Minn. 43, 45 n. 1, 160 N.W. 2d 571, 573 n. 1 (1968). Contrary to the Government's assertion, the case involved evidentiary issues—not merely questions of interpretation (*see* 281 Minn. at 44, 160 N.W. 2d at 573)—and established as a matter of adjudicated fact that Elbow Lake had suffered no damage.

4. Perhaps most significant is the fact that Otter Tail was required to put up the undertaking by a state statute which the court quoted as follows:

> "* * * Such bond shall be conditioned for payment to the public body of any loss or damage which may

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[13] State *ex. rel.* Jensen v. Rasmussen. *See* Otter Tail Br., p. 14.

[14] Otter Tail v. Town of Aurora. *See* Otter Tail Br., pp. 14-15.

[15] Anderson v. City of Hankinson. *See* Otter Tail Br., p. 16.

> be caused to the public body or taxpayers by such delay, to the extent of the penal sum of such bond, if such party, or parties, shall not prevail therein.'" 281 Minn. at 45, n. 1, 160 N.W. 2d at 573, n. 1.

This statute makes it effectively impossible for any utility to prevent the establishment of a municipal system by dilatory litigation since the utility will pay the cost of any delay while the municipality itself will be made whole. The Judgment in the instant case completely disregards this statutory safeguard.

5. The Government's statement that "each town which attempted to establish its own system found itself enmired in litigation sponsored by Otter Tail" (Gov't Br., p. 83), is simply not true. As pointed out in Otter Tail's main brief (p. 18), "no suits at all were brought with respect to Finley or Velva, although these towns also had initially elected to terminate Otter Tail's franchise." The fact is that, unlike the defendants in *California Motor Transport*, Otter Tail had no program of litigating in each instance regardless of the merits. The district court made no finding that Otter Tail's litigation efforts were anything other than bona fide. The evidence of record on this point consists of the following uncontradicted, sworn testimony of Otter Tail's president:

> "There is, and I can state this categorically, no established policy of Otter Tail Power Company insofar as litigation involving any of these municipal proceedings is concerned. Each instance is analyzed on its own merits, and after consultation with counsel, a determination is made as to whether there is any merit to litigation of some aspect of a case, to the end that there would be a benefit from adjudication of that issue to Otter Tail Power Company, or in instances, to the industry; and only if there is a determination that there is merit to the proceeding, is counsel instructed to begin litigation." (A. 722).

6. The Government states (i) that the pendency of litigation impedes the financing of a municipal electric system

because it prevents the issuance of a no-litigation certificate, and (ii) that Otter Tail instituted or supported litigation that "had the effect of halting or delaying efforts to establish municipal systems."[18] Gov't Br., pp. 21-22. This suggests that Otter Tail commenced suits in order to negative no-litigation certificates rather than to obtain favorable judicial determinations. The reason this charge is left to innuendo rather than stated is that it is not true. There is absolutely no evidence and, a fortiori, no finding, that Otter Tail's litigation efforts were motivated by any desire to hinder municipal financing in this manner. To the contrary, all of the evidence of record shows that Otter Tail litigated in each case because it believed that it had a meritorious cause of action and that its position would be vindicated by a court judgment. Otter Tail Br., p. 18.

7. The only evidence of record as to Otter Tail's motive for litigating is again the testimony of its president:

> "Q. And is the factor that if the company is to be damaged or put out of business [by the establishment of a municipal system], that the proceedings that will result in that are done in a legal fashion, a part of the consideration that is taken into consideration?
>
> A. If they are going to take our property, we wish to make certain that it is done in accordance with law and not in any other manner." (A. 723).

Insistence upon due process and compliance with law is, of course, always time consuming. But the evidence at trial was uncontroverted that it was the enforcement of applicable, legal requirements, not the resulting delay, that prompted Otter Tail to bring suit.

8. The Government asserts that Otter Tail's "characterization" of its litigation as political in nature somehow proves that "the real object of the suits was not the

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[18] In fact, no such litigation ever "halted" the establishment of a municipal system. *See* Otter Tail Br., pp. 17-18.

merits." Gov't Br., p. 81. This is a blatant *non sequitur*. As plainly stated in Otter Tail's main brief (pp. 64-66), Otter Tail's suits were "political" because they generally involved the failure of a town to hold a required election, and because they were intimately related to the basic, political struggle between private and public power. This obviously does not detract in the slightest from the merits, or Otter Tail's good faith, in any given case. Rather than answering Otter Tail's argument that the antitrust laws were never intended to apply to such political controversies, the Government has simply sought to distort it.

B. The Government's Argument Is Erroneous As A Matter Of Law.

1. The Government apparently concedes that, in contrast to *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), there is no evidence in the instant case that Otter Tail ever denied any competitor access to public tribunals. *See* Gov't Br., pp. 81-82. The Government accordingly relies upon the "sham" exception originally articulated in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961), arguing that Otter Tail's litigation was "sham" because Otter Tail was primarily interested in preventing its ouster from the towns in question rather than in curing the legal defects directly involved in each suit. Gov't Br., pp. 80-81.

2. If this were the standard, then (contrary to the Court's holding) the activities of the defendants in *Noerr* itself would have been "sham". The railroads in that case supported restrictive legislation on the use of highways, for example, because they wished to foreclose trucker competition, not because of any public spirited concern with potholes. Indeed, the trial court in *Noerr* found that the defendants "sole purpose . . . was to destroy the truckers as competitors for the long-distance freight business." 365 U.S. at 138. (Emphasis in original). This Court held,

however, that so long as the defendants did in fact seek to influence government action, their motive in doing so was totally irrelevant. *See id.* at 138-139.[17]

3. In the absence of any evidence that Otter Tail's suits were brought in bad faith, the fact that they may have delayed the establishment of some municipal systems is likewise irrelevant to the application of *Noerr*. In *Noerr* itself, the trial court found that it was the defendants' "*purpose and intent . . . to hurt the truckers in every way possible even though they secured no legislation.*" *Id.* at 142. (Emphasis in original). This Court interpreted that finding to mean that "the truckers sustained some direct injury as an incidental effect of the railroads' campaign . . . and that the railroads were hopeful that this might happen." *Id.* at 143. It proceeded to hold that even such direct, purposeful injury would not render the defendants' conduct illegal so long as they were also seeking to elicit favorable government action. Only acts which were not aimed at public officials at all—which were "actually *nothing more than* an attempt to interfere directly with the business relationships of a competitor"—could be considered a "mere sham" that would be outside the scope of the *Noerr* immunity. *Id.* at 144. (Emphasis added).

4. The *Noerr* Court explained the rationale for its holding as follows.

> "It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the in-

[17] Similarly, in *California Motor Transport*, this Court held that, so long as it does not seek to bar its competitors' access to adjudicatory tribunals, "any carrier has the right of access to agencies and courts . . . in order to defeat applications of its competitors for certificates as highway carriers. . . ." 404 U.S. at 515. Such opposition obviously does not become "sham" merely because the carrier may be interested in restricting its competitor's operations as well as in seeing that the public interest standards of the applicable regulatory statute are upheld.

> fliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns." *Id.* at 143-144.

By the same token, it is inevitable that any law suit which challenges the legality of municipal action in establishing an electric system will—to some extent—delay or interfere with the town's plan. But to hold that this incidental effect of litigation renders such suits unlawful would mean that the assertion by a utility of its access to the courts is *per se* illegal under the antitrust laws. Surely, here (as in *Noerr*) any such reading of the Sherman Act would be plainly contrary to Congress' intent.

5. The Government makes the circular argument that under *California Motor Transport,* the *Noerr* principle does not apply if a defendant's conduct violates the antitrust laws. Gov't Br., pp. 80-81. Obviously, if a defendant's conduct, standing by itself, does *not* violate the Sherman Act, there is no need for *Noerr* since there would be no basis for liability in any event. The function of the doctrine is to provide *immunity* for conduct which *would* be unlawful absent the protection of the First Amendment. If all litigation having an anticompetitive purpose or effect is to be deemed "sham", then the scope of the exception would be coextensive with the effective operation of the rule. Surely, if this had been the view of the Court in *California Motor Transport,* it would have simply overruled *Noerr,* or held that it did not apply to litigation. Instead, the Court reaffirmed *Noerr,* held that it did apply to litigation, and relied expressly on the "sham" exception. In point of fact, what *California Motor Transport* holds is that the First Amendment does not shield a defendant's efforts to deprive *others* of the opportunity to exercise their right to petition. The Gov-

ernment seeks simply to ignore this holding—since it means that Otter Tail's litigation activities are protected—and, in so doing, it totally distorts the meaning and significance of the *California Motor Transport* decision.

6. The various cases and the quotation from *California Motor Transport* which the Government relies upon at pages 82-83 of its brief, are not in point. In this case, there is no evidence whatsoever of fraud (as in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965)) or misrepresentation (as in *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)). As indicated above, the record likewise fails to show any "pattern of baseless, repetitive claims" leading to the conclusion that "judicial processes have been abused," or that competitors have been denied free and meaningful access to the courts. *See* pages 21-22, *supra*. *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963), involved a conspiracy pursuant to which certain patents were transferred. Since litigation activities as such were not even attacked in that case—which makes no mention whatever of *Noerr*, decided only two years earlier—it plainly has no application to the issues at bar. To the extent that the lower court decisions relied upon by the Government may be read as outlawing bona fide litigation merely because a suit may have an anticompetitive purpose or effect, Otter Tail submits that they should be deemed overruled by this Court's subsequent decisions in *Noerr*, *Pennington* and *California Motor Transport*.

C. The Judgment Below Constitutes An Unconstitutional Prior Restraint On The Exercise Of First Amendment Rights.

1. The Judgment enjoins Otter Tail from:

> "Instituting, supporting or engaging in litigation, directly or indirectly, against cities and towns, and

> officials therof, which have voted to establish municipal electric power systems, for the purpose of delaying, preventing, or interfering with establishment of a municipal electric power system[.]" (A. 132).

As shown above, it is inherently impossible for Otter Tail to bring any suit challenging municipal conduct in the setting up of an electric system, without delaying or interfering with the establishment of that system to some extent. *See* page 27, *supra*. The Judgment thus effectively bars Otter Tail from seeking judicial redress from any illegal action on the part of a municipality, however flagrant it may be. Since this Court has declared free access to judicial tribunals to be an "aspect of the right of petition" protected by the First Amendment, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. at 510, the district court's prior restraint on Otter Tail's future exercise of that right is plainly unconstitutional. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931).

2. In *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971), this Court held unconstitutional an injunction far more limited and less onerous than the one at bar. The Court said:

> "This injunction, like a criminal statute, prohibits conduct under fear of punishment. Therefore, we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down." *Id.* at 581.

Among other particulars, the decree in *United Transportation Union* prohibited the union from "giving or furnishing legal advice to its members or their families." *Id.* at 580. In holding this provision unconstitutional, the Court reaffirmed "the commonsense proposition that such activity is protected by the First Amendment." *Id.* Indeed, in *NAACP* v. *Button*, 371 U.S. 415 (1963), the Court struck

down similar provisions in a Virginia statute merely because of the "danger of smothering all discussion looking to the eventual institution of litigation. . . ." *Id.* at 434. If such prohibitions—which have only an indirect, chilling effect on access to the courts—are unconstitutional, then surely the same is true of the instant Judgment which directly freezes Otter Tail's constitutional right by prohibiting all efforts to seek any judicial redress whatsoever.

3. To appreciate the full breadth of the court's decree, one must consider how it will operate in practice. What is Otter Tail to do if, a year from now, a municipality elects to take over its retail business and proceeds in clear violation of state law to market a bond issue without first holding the necessary referendum? If Otter Tail commences a law suit, as it is otherwise entitled to do, it will risk incurring the full penalties of contempt. The legitimate objective of obtaining a court order to compel an election in the hope that the voters will withhold their approval for the bond issue may be deemed a contemptuous purpose to prevent the establishment of the system. Indeed, the commencement of any action to subject a municipality to the restraints of applicable state law may be considered an effort to delay or interfere with its plans. If outraged citizens of the town commence a law suit on their own, Otter Tail and its counsel cannot even offer legal advice without risking contempt for "indirectly supporting" such litigation. Surely any such injunction is fundamentally irreconcilable with the right of free access to judicial processes which this Court declared to be an aspect of the First Amendment in *California Motor Transport.*

4. The Judgment at bar is far broader than many statutes which this Court has heretofore invalidated because of their threat to First Amendment freedoms. *See, e.g., Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971); *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969); *Kunz* v. *New York,* 340

U.S. 290 (1951); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The problem, however, is in the basis for, rather than the drafting of the court's injunction. Given the conduct upon which the court predicated its finding of Section 2 illegality, it is inherently impossible to frame a constitutionally valid decree. If Otter Tail's activities were in fact "sham"—if, for example, it acted directly to interfere with competitors' access to adjudicatory tribunals—then such conduct would not be constitutionally protected and could be enjoined.[18] But where the purported violation itself consists of nothing more than the exercise of First Amendment rights, the impossibility of entering a constitutional injunction merely serves to confirm the application of the *Noerr* immunity.

IV.

The Decision Below Is Erroneous As A Matter Of Antitrust Law.

1. The Government argues that since each town makes its purchasing decision as a unit, "[i]t follows" that each such municipality is a separate geographical market. Gov't Br., p. 65. This is an absurd *non sequitur*. It has never been true that the unit of competition (generally, the individual buyer) is itself the relevant market. If it were, then in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 575-576 (1966), the relevant market would have been, not the national market (which the Court accepted) or even each local market (which the Court rejected), but rather each individual business or family subscribing to the defendants' service. Under such analysis, a Section 2 violation could

[18] In *California Motor Transport* itself, for example, the district court may simply enjoin the continuation of the conspiracy, thereby restoring plaintiffs' free access to courts and agencies without directly interfering with the defendants' exercise of their constitutional rights.

be established in any case where a seller has a "monopoly" with respect to a single customer. It is not surprising that the Government cannot cite a single authority in support of its position.

2. The Government's argument that Otter Tail has monopoly power within Federal Power Commission Supply Area No. 26 is predicated upon the proposition that it is the number of towns served (regardless of size) rather than the amount of electricity sold, that is "competitively significant." Gov't Br., p. 66. Neither of the cases cited by the Government supports this strange contention. In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 331 (1963), market share was determined on the basis of assets, deposits and loans, not numbers of customers. The percentages indicated with respect to deposits and loans referred to total dollar amounts (Brief for the United States in this Court at 34), not numbers of loans or accounts compared as equal units regardless of size. Similarly, in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), the amount of market foreclosure was calculated in terms of total tonnage of coal, not the number of sellers or the fact that there was only one buyer involved.

3. The Government's position is further based on the assumption that where certain suppliers in a market do not aggressively compete, their market shares are not to be counted at all. Under this reasoning, in *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972), where Champion supplied all of Ford's spark plug requirements and Autolite all of Chrysler's, each of these spark plug manufacturers should have been deemed to have 100% of its own original equipment "market" in view of the absence of competition by others to supply either of these automobile companies. In determining market shares, however, this Court looked to the market as a whole. *Id.* at 566. The Government's approach—which would make even the smallest electric sup-

plier a "monopolist"—is thus peculiarly its own; and, again, no authority is cited in its support.[19]

4. The artificiality of the Government's argument is demonstrated by its complete failure to deal with the issue of "monopoly power" in functional terms. It thus has made no attempt to relate its statistical contentions to the underlying purposes of Section 2 by showing that Otter Tail has the power either to fix prices or exclude competition. The fact is, Otter Tail can do neither of these things, and is therefore not a monopolist (*see* Otter Tail Br., pp. 70-71), regardless of how the Government may seek to manipulate market share data to create some inflated percentage.

5. The Court's finding that Otter Tail has dominance over transmission is predicated upon the assumption that cooperative-owned 12.5 kv. lines cannot be used to bring electricity to municipalities. (A. 35-36). In fact, Colman, Aurora, Finley and Velva can all be served by precisely such "distribution" lines, and there is no evidence that any other municipality (except possibly Elbow Lake and Hankinson)[20]—could not obtain similar service. *See* Otter Tail Br., pp. 8-9, n. 11.

6. The Government's contentions regarding the "refusal to deal" cases and the so-called "bottleneck theory" (Gov't Br., pp. 70-76) have already been dealt with in Otter Tail's main brief (pp. 75-78). With respect to Otter Tail's argument that the restrictive provision in

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[19] In the instant case the Government is also wrong on the facts, since, in Otter Tail's area, rural electric cooperatives and other power suppliers do compete. *See* Otter Tail Br., pp. 6, 8-9 (n. 11), 12.

[20] As demonstrated in Otter Tail's main brief (pp. 10-12, 77-78), in view of the availability of other feasible alternatives, as well as Federal Power Act remedies, Otter Tail cannot meaningfully be said to have had "dominance" over transmission even with respect to these two towns.

its contract with the Bureau of Reclamation was a legal ancillary restraint rather than an agreement to divide markets, the Government offers no rebuttal other than to label Otter Tail's position as "erroneous." Instead, the Government now argues that Otter Tail used its "dominant" power to secure this agreement and thereby violated Section 2. This adds nothing, however, to the Government's contention that a refusal to wheel is itself unlawful. If Otter Tail is correct that it has no duty to wheel, then it likewise has no obligation to offer the Bureau the use of its facilities on a nonrestricted basis. In any event, the restrictive provisions in the Bureau contract were not peculiar to any "monopolistic" plan on the part of Otter Tail. Rather, as the record plainly shows, the Bureau entered into similar contracts with numerous utilities (A. 693-694), the restrictive provisions in question being common in agreements of this kind where utilities seek to coordinate their systems without offering the use of their facilities as a means of taking away their own customers.

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In its main brief (pp. 81-83) Otter Tail pointed out the danger to the power industry and the nation generally if simplistic *per se* concepts of antitrust were to replace the Federal Power Act in the regulation of electric utilities. Even Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. L. Rev. 64 (1972)—on which the Government relies extensively in its brief—criticizes the district court decision in this case for its "mechanistic application of the [Sherman Act] and case law to a quite different underlying situation. . . ." *Id.* at 90, n. 118. Yet it is precisely this "mechanistic" approach that the Government now espouses.

Testifying before Congress in 1966, Donald Turner, then head of the Antitrust Division, indicated an entirely different view toward utility problems. Indeed, he specifically argued that antitrust immunity was unnecessary

for the industry—even with respect to market divisions and price fixing—because "[u]nder the antitrust laws, pooling and other similar arrangements are tested by a 'rule of reason.' "[21] Continuing, he said:

> ". . . we are dealing with an area in which peculiar needs of the industry are highly relevant and it seems to me quite clear that approval by the Power Commission, even without the right to immunize under the antitrust laws, would be given a great deal of weight in any deliberations by the Department of Justice because that is a reflection of what an expert agency thinks the needs of the occasion are." Hearings on S. 3136 at 69.

It is incongruous that, six years after Mr. Turner's testimony, the Justice Department is in this Court opposing the Federal Power Commission and urging a *per se* approach that takes absolutely no account of the "peculiar needs of the industry."

What is most striking is that the Government is taking this position in a case that presents the least possible compelling grounds for the application of antitrust. For example, the Government refers in its brief to the level of concentration in the power industry. Gov't Br., p. 56. But as of 1970, Otter Tail's generating capacity was only

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[21] *Hearings on S. 3136 Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 58 (1966) (hereinafter, "Hearings on S. 3136"). *See also Hearings on H.R. 5277 and Other Bills Before The Communications and Power Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 824, 830, 831 (1971). Moreover, Mr. Turner specifically stated that "ancillary agreements are legal if they are necessary to carry out a legitimate primary agreement." Hearings on S. 3136 at 58. *See also Hearings Pursuant to S. Res. 334 Before the Antitrust and Monopoly Subcommn. of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 227-228 (1970). In contrast, the Department here takes the position that the restrictive provisions in Otter Tail's contract with the Bureau are illegal *per se* without regard for their necessity to the primary agreement.

.07 percent of the total installed generating capacity of the industry.[22] Does the Government really believe that it is promoting decentralization when it seeks to apply antitrust to destroy one of the country's smallest private utilities?

When one considers the supposed anticompetitive impact of Otter Tail's practices, the Government's departure from any "rule of reason" in this case is even more difficult to comprehend. The court's findings deal primarily with six towns, the largest of which has a population of 1550. The Government now concedes that Otter Tail's activities were perfectly legal with respect to two municipalities. *See* Gov't Br., pp. 17-18. This leaves four towns, as to two of which the Government concedes that Otter Tail did *not* have transmission "dominance." *See* Gov't Br., p. 17. Furthermore, of these four municipalities, three now own and operate their own electric systems. Competition was thus "suppressed" in only one town—Hankinson—if one chooses to use this term to describe the fact that the municipal electorate voted the public power faction out of office.

Otter Tail is a strange monopolist indeed. Small in size, beset by competition, unable to prevent any municipalities wishing to defect from its system from doing so, it is now subjected to a draconian decree that forces it to wholesale and wheel to all, that forbids it from exercising its First Amendment rights, and that abrogates its interconnection agreements out of hand. Surely such a result provides compelling confirmation that *per se* antitrust notions cannot be substituted for balanced, expert regulation without wreaking havoc with the nation's electric power resources.

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[22] Calculated from FPC, 1970 NATIONAL POWER SURVEY, Table 1.2 at p. I-1-17 and FPC, STATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE U. S. FOR YEAR ENDED DECEMBER 31, 1970 at p. 718.

CONCLUSION

For The Reasons Stated Herein And In Otter Tail's Main Brief, The Decision Below Should Be Reversed And Remanded With Instructions To Dismiss The Government's Complaint.

Respectfully submitted,

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